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Nos. 93-1612, 93-1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EUGENE LUDWIG,
COMPTROLLER OF THE CURRENCY, ET AL.,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit misapplied the *Chevron* standard when it did not adopt the Comptroller's new construction of 12 U.S.C. § 24(7) or his new determination that annuities do not constitute "insurance" for purposes of 12 U.S.C. § 92, even though the Comptroller contradicted his prior construction of those statutes. (No. 93-1612)

2. Whether 12 U.S.C. § 92, which provides that, "in addition to" their other powers, national banks located in places with 5,000 or fewer inhabitants may act as the agent for "any fire, life, or other insurance company," impliedly bars national banks in more populous places from brokering annuities. (No. 93-1612)

3. Whether the federal law permits national banks wherever located, to act as agents in the sale of annuities. (No. 93-1613)

4. Whether the sale of annuity contracts is "necessary to carry on the business of banking" under 12 U.S.C. § 24(7).

DISCLOSURE OF CORPORATE PARENT

American General Corporation is the parent corporation of respondent, Variable Annuity Life Insurance Company.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
DISCLOSURE OF CORPORATE PARENT	ii
TABLE OF AUTHORITIES	v
SUMMARY	1
COUNTER-STATEMENT OF THE CASE	2
A. 1916: Congress Allows Small-Town National Banks To Act As Agent For Insurance Companies	2
B. 1968: The Fifth Circuit Holds That Section 92 Bars National Banks From Acting As Agents For Insurance Companies In Towns With Population Over 5,000	3
C. 1978: The Comptroller Rules That Section 92 Bars The Sale Of Annuity Contracts By Large-Town National Banks	4
D. 1990: The Comptroller Reverses Himself On the Sale Of Annuity Contracts By National Banks	4
E. Proceedings Below	5
REASONS FOR DENYING THE WRIT	7
I. THE COURT OF APPEALS CORRECTLY INTERPRETED SECTION 92	8
A. The Court of Appeals Correctly Construed The Banking Statutes	8
B. The Court Of Appeals Properly Applied *Chevron*	12

II. THERE IS NO CONFLICT AMONG THE LOWER COURTS 14

III. THE SALE OF ANNUITY CONTRACTS IS NOT "NECESSARY TO CARRY ON THE BUSINESS OF BANKING" 17

CONCLUSION 18

APPENDICES 1a

TABLE OF AUTHORITIES

CASES **PAGE**

American Land Title Ass'n v. Clarke, 968 F.2d 150 (2d Cir. 1992), *cert. denied sub nom., Ludwig v. American Land Title Ass'n*, 113 S. Ct. 2959 (1993) . . . . . *passim*

Botany Worsted Mills v. United States, 278 U.S. 282 (1929) 8

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988) 12

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) . . . 6-7, 12-13, 15

Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979) 10

Independent Bankers Ass'n v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) 14-15

Independent Ins. Agents of Am., Inc. v. Ludwig, 997 F.2d 958 (D.C. Cir. 1993) 16

Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992) . . 13

Mu'Min v. Virginia, 111 S. Ct. 1899 (1991) 10

New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Dep't, 83 N.Y.2d 353 (1994) 17

Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524 (1991) 12

Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992) 6, 13

Ross v. Moffitt, 417 U.S. 600 (1974) 8

Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010 (5th Cir. 1968) 3, 5-6, 12, 14-15

SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967) 12

SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959) 11

Variable Annuity Life Ins. Co. v. Clarke, 786 F. Supp. 639 (S.D. Tex. 1991), *reversed*, 998 F.2d 1295 (5th Cir. 1993), *reh'g denied*, 13 F.3d 833 (5th Cir. 1994) 5

Variable Annuity Life Ins. Co. v. Clarke, 998 F.2d 1295 (5th Cir. 1993), *reh'g denied*, 13 F.3d 833 (5th Cir. 1994) . . . . . *passim*

STATUTES AND RULES

10 U.S.C. § 7082 10

12 U.S.C. § 24(7) . . . . . *passim*

12 U.S.C. § 92 . . . . . *passim*

12 U.S.C. § 1843(c)(8) 11

26 U.S.C. § 408(b) 10

26 U.S.C. § 501 10

26 U.S.C. § 814(b) 10

26 U.S.C. § 816(a) 10

Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320 , §§ 118(a), 601 (1982) 14

S. Ct. Rule 10.1 8

LEGISLATIVE AND ADMINSTRATIVE MATERIALS

53 Cong. Rec. 11001 (July 14, 1916) 2, 3, 9

2 Fed. Res. Bull. 73 (Feb. 1, 1916) 2

OCC Interpretive Letter No. 241, *reprinted in* Whiting, *A Guide to the Federal Law of Banking and Insurance* (1991) 4

OCC Interpretive Letter No. 331, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (Apr. 4, 1985) 5

OTHER MATERIALS

S. Huebner and K. Black, *Life Insurance* (6th ed. 1964) 10

R. Keeton, *Insurance Law* § 1.2 (a)(1971) 10

David W. Roderer, "Congress Should Defer Action on Bank Annuity Sales," *American Banker* (Nov. 3, 1993) 16

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BRIEF FOR THE RESPONDENT IN OPPOSITION

SUMMARY

This Court should not review the decision below, which was a correct and unremarkable interpretation of 12 U.S.C. §§ 92 and 24(7). The Fifth Circuit's decision is consistent with *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied sub nom., Ludwig v. American Land Title Ass'n*, 113 S. Ct. 2959 (1993), and is no more worthy of review than that case was a year ago. This case presents no conflict among the lower courts, and petitioners' suggestions of grave peril to the banking industry are greatly exaggerated.

COUNTER-STATEMENT OF THE CASE

A. 1916: Congress Allows Small-Town National Banks To Act As Agent For Insurance Companies

In 1916, at the request of then-Comptroller of the Currency John Skelton Williams, Congress enacted 12 U.S.C. § 92 ("section 92"), which provides that national banks (emphasis added):

> located and doing business in any place the population of which does not exceed five thousand inhabitants ... [may] *act as the agent for any fire, life, or other insurance company* authorized by the authorities of the State in which such bank is located to do business in such State, by soliciting and selling insurance and collecting premiums on policies issued by such company . . . .

In a letter to Congress proposing this provision, Comptroller Williams observed that under existing law, "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies." 53 Cong. Rec. 11001 (July 14, 1916). Four months earlier, the Federal Reserve Board also had concluded that national banks had no authority to engage in insurance agency activities. 2 Fed. Res. Bull. 73, 74 (Feb. 1, 1916).

Judging that "small national banks" would benefit from additional sources of revenue, Comptroller Williams asked Congress to grant "limited" authority to national banks located in small "villages and towns" "to act as agents for insurance companies in the placing of policies of insurance." 53 Cong. Rec. 11001. He sought congressional action because "the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." *Id.*

Wary of allowing banks "to trespass upon outside business naturally belonging to others," Comptroller Williams also explained that the small amount of business generated by this new insurance power would "not [be] likely to assume such proportions as to distract the officers of the bank from the principal business of banking." *Id.* Indeed, Comptroller Williams pointedly advised Congress that "it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers." *Id.*

B. 1968: The Fifth Circuit Holds That Section 92 Bars National Banks From Acting As Agents For Insurance Companies In Towns With Population Over 5,000

Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1012-1013 (5th Cir. 1968), construed section 92 to "prohibit national banks from carrying on the business of insurance agents in places of more than 5,000 population." Applying the principle of *expressio unius est exclusio alterius*,[1] *Saxon* reasoned that by conferring limited insurance agency powers upon small town national banks, Congress "clear[ly]" intended to deny "any other power" for national banks to act as insurance agents. *Id.*, at 1014, 1016. Noting the legislative genesis of section 92, *Saxon* further explained that prior to its enactment, it was "universally understood that no national banks possessed *any* power to act as insurance agents." *Id.*, at 1013 (emphasis in original). *Saxon* therefore rejected the assertion that national banks could act as insurance agents under 12 U.S.C. § 24(7), which grants banks "all such incidental powers as shall be necessary to carry on the business of banking."

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[1] "The expression of one thing is the exclusion of another."

C. 1978: The Comptroller Rules That Section 92 Bars The Sale Of Annuity Contracts By Large-Town National Banks

In an opinion letter dated June 16, 1978, the Comptroller ruled that a national bank's proposal to broker annuity contracts as agent for an insurance company "would constitute the bank a seller or broker of insurance in violation of the provisions of 12 U.S.C. § 92." R. 7-8.[2] The Comptroller rejected an attempt by that bank to evade section 92 by characterizing its role as "fiduciary." The Comptroller observed that "in reality" "the bank is receiving [a fee] for the sale of insurance." *Id.*

A few years later, the Comptroller similarly ruled that section 92 would prohibit a national bank from acting as agent in the sale of life insurance. OCC Interpretive Letter No. 241, *reprinted in* Whiting, *A Guide to the Federal Law of Banking and Insurance* (1991), p. 328 (Mar. 26, 1982) ("OCC Ltr. 241"). The Comptroller explained:

> it is highly unlikely that a court would consider the activities of a national bank which acted as an agent in the sale of life insurance as incidental to the business of banking under 12 U.S.C. 24(7).

D. 1990: The Comptroller Reverses Himself On the Sale Of Annuity Contracts By National Banks

In 1989, NationsBank (then NCNB) sought permission from the Comptroller to sell annuity contracts through a subsidiary. R. 57-59. According to NationsBank, the new activities would involve "the offering and sale, on an agency basis, of various annuity contracts . . . offered by a number of insurance companies." R. 11-12. NationsBank explained that purchasers could choose from annuity contracts having fixed annuity features, variable annuity features, or a combination of fixed and variable features. R. 13.

[2] References to "R. ___" herein are page references to the record on appeal to the court of appeals. The text of the June 16, 1978 letter is reproduced at Appendix A, *infra*.

By letter dated March 21, 1990 (the "Approval"), the Comptroller approved the proposal. The Approval conceded that "annuities have historically been a product of insurance companies" and that "annuities often share with insurance the need for actuarial calculations" of "mortality risk." NationsBank Pet. App. 38a-39a. To avoid the statutory limits on the insurance activities of national banks, however, the Comptroller renamed fixed annuity contracts, calling them "financial investment instruments." He then decreed that national banks have the inherent power to "broker a wide variety of financial investment instruments." *Id.*, at 38a. The Comptroller added that fixed annuity contracts are "similar to" variable annuity contracts, which he previously had allowed national banks to broker. *Id.*, at 39a; OCC Interpretive Letter No. 331, *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 at 77,773-77 (Apr. 4, 1985) ("OCC Ltr. 331").

The Approval disagreed with *Saxon*'s holding that the limited "insurance agency power in Section 92 . . . negates the existence of any other power to act as an insurance agent." 399 F.2d at 1014; NationsBank Pet. App. 42a. The Approval also expressed "doubt[] that the word 'insurance' in section 92 can be construed to include annuities." *Id.*, at 43a. The Approval never mentioned the Comptroller's 1978 conclusion that section 92 bars national banks from selling annuity contracts, except in small towns.

E. Proceedings Below

VALIC brought suit challenging the Approval as contrary to statute. The district court denied VALIC's motion for summary judgment and granted petitioners' cross-motions for summary judgment. *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991) (NationsBank Pet. App. 29a-34a). The court of appeals reversed. *Variable Annuity Life Ins. Co. v.*

Clarke, 998 F.2d 1295 (5th Cir. 1993), *reh'g denied*, 13 F.3d 833 (5th Cir. 1994) (NationsBank Pet. App. 1a-28a).

Finding that the language and legislative genesis of section 92 plainly establish Congress' meaning, the court of appeals reaffirmed *Saxon*'s central holding that "under § 92 'national banks have no power to act as insurance agents in cities of over 5,000 population.'" NationsBank Pet. App. 6a, 10a. In reaching that conclusion, the court noted that deference to an administrative interpretation is not appropriate under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when the intent of Congress is clear. NationsBank Pet. App. 9a (*citing Presley v. Etowah County Comm'n*, 112 S. Ct. 820 (1992)).

The court drew further support from the 1992 ruling in *American Land Title Ass'n v. Clarke*, *supra*, which reversed a decision by the Comptroller that allowed national banks to act as agents for title insurance companies. The court of appeals emphasized that *American Land Title*, like *Saxon* (NationsBank Pet. App. 7a),

> cogently deduced that 'had Congress intended to grant national banks located in towns with a large population the authority to sell insurance, it would never have limited the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants.'

The court of appeals also disagreed with the Comptroller's alternative contention that section 92 does not apply because "annuities are not insurance." NationsBank Pet. App. 10a. The court observed that the Comptroller had conceded that "annuities have historically been a product of insurance companies" and that annuity contracts are based on "actuarial calculations" of mortality risk. *Id.*, at 10a, 13a n.4. Indeed, the court reported that "[a]ll fifty states currently regulate annuities under their insurance laws." *Id.*, at 11a. Explaining that many annuity

contracts transfer and distribute mortality risk, the court concluded that annuity contracts are "insurance in the true sense of the term." *Id.*, at 12a, n.3.

Finally, the court of appeals rejected the Comptroller's assertions that section 92 does not apply to "specialized" insurance products like annuity contracts and that the selling of annuity contracts is an "incidental power" granted to national banks under 12 U.S.C. § 24(7). Stressing section 92's bar against large-town national banks serving as agents for "any . . . insurance company," the court refused to engage in the "arbitrary exercise of examining whether a particular type of insurance product conforms to a platonic form of 'general' insurance." NationsBank Pet. App. 13a (*quoting American Land Title*, 968 F.2d at 156), 14a. The court of appeals also observed that the sale of annuity contracts is by no means "necessary to carry on the business of banking" under § 24(7), and even if it were necessary, the specific terms of section 92 would control over that more general statute. *Id.*, at 15a (*citing American Land Title*, 968 F.2d at 157).

The full court of appeals denied the petition for rehearing en banc, with four judges dissenting. NationsBank Pet. App. 19a. Six judges were recused, while one member of the panel was a senior judge and did not participate in the en banc process.

REASONS FOR DENYING THE WRIT

Petitioners offer two reasons why this Court should grant the petition. First, the government contends the court of appeals erred because it did not "adequately justify" its rejection of the Comptroller's interpretation of section 92 under *Chevron*. Gov't Pet. at 11; *accord* NationsBank Pet. at 10, 14. Second, the government asserts that the issue whether "Section 92 limits banks' ability to make agency sales" has "produced a conflict among the circuits." Gov't Pet. at 19; *accord* NationsBank Pet.

at 22. Neither contention is correct, nor warrants review by this Court.

Moreover, petitioners totally ignore the Fifth Circuit's holding that the sale of annuity contracts is beyond a bank's powers under § 24(7); that holding provides a fully adequate basis for sustaining the ruling below that would pretermit consideration of the questions petitioners argue to this Court.

I. THE COURT OF APPEALS CORRECTLY INTERPRETED SECTION 92

Petitioners' principal claim is that the court of appeals erred. This Court reviews for error only in cases of exceptional importance. S. Ct. Rule 10.1; *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). The unremarkable statutory interpretation in this case presents neither error nor any issue of exceptional importance.

A. The Court of Appeals Correctly Construed The Banking Statutes

Petitioners challenge three factors in the court of appeals' interpretation of section 92, arguing (i) that section 92 grants additional bank insurance powers without imposing any limitation upon those powers, (ii) that section 92 applies only to so-called "broad forms" and not to so-called "specialized forms" of insurance like annuity contracts, and (iii) that annuity contracts are not "insurance" under section 92. These claims are without force.

First, the court of appeals properly held that the affirmative grant of insurance powers to small town banks necessarily included a denial of such powers to banks in more populous areas. NationsBank Pet. App. 6a, 10a. *See Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode"). Quoting from *American Land Title*, the court reasoned (NationsBank Pet. App. 7a):

> had Congress intended to grant national banks located in towns with a large population the authority to sell insurance, it would never have limited the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants.

The court of appeals also properly emphasized the genesis of section 92, which was enacted in response to Comptroller Williams' recommendation in 1916. Comptroller Williams noted that national banks had no powers to act as insurance agents and recommended that such powers "should be limited to banks in small communities." *Id.* (*quoting* 53 Cong. Rec. 11001 (1916)). Indeed, the government concedes that "Section 92 carries some negative implication" and that "there would be little point in granting small-town banks the power to act as insurance agents if any bank could already do so . . . ." Gov't Pet. at 16.

Second, the court of appeals joined the Second Circuit in rejecting the Comptroller's claim that section 92 applies only to "general" types of insurance. NationsBank Pet. App. 13a-14a. That contention fundamentally misreads the phrase "fire, life, or other insurance company" in section 92. The words "fire, life or other" modify the term "*insurance company*," not the word "*insurance*." Petitioners have long conceded that NationsBank is selling annuity contracts as agent for "life insurance" companies. R. 53-55.[3] NationsBank's activities thus are covered by the statutory phrase "fire, *life* or other insurance company."

Third, petitioners claim that annuity contracts are not "insurance." This claim is belied by the Approval's concession that "annuities have historically been a product of insurance companies" and include mortality factors and actuarial projections. NationsBank Pet. App. 10a, 13a n.4. The government also

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[3] Indeed, respondent, which specializes in annuity products, is named the Variable Annuity *Life Insurance* Co.

acknowledges that annuity contracts "share with insurance the need for actuarial calculations" and that the element of "mortality risk" is present in many annuity contracts. Gov't Pet. at 7.[4] Moreover, all fifty states regulate annuity contracts under their insurance laws. NationsBank Pet. App. 11a (collecting authorities). The unanimous view of state legislatures that annuity contracts are an insurance product is entitled to considerable weight. *See Mu'Min v. Virginia*, 111 S. Ct. 1899, 1905 (1991) (noting that prior decision "relied heavily on a unanimous body of state court precedents").

Other federal laws also "reflect the fact that annuities are an insurance product." NationsBank Pet. App. 11a (*citing* 26 U.S.C. § 816(a)). *Accord* 26 U.S.C. § 408(b) ("individual retirement annuity" defined as "an annuity contract . . . issued by an insurance company"); 26 U.S.C. § 501 ("[f]or purposes of this subsection, the issuance of annuity contracts shall be treated as providing insurance"); 26 U.S.C. § 814(b) ("insurance contract" defined to include "annuity contract"). The government attempts to minimize these authorities by asserting that "annuities are treated *sui generis* for tax purposes," Gov't Pet. at 12, n.4, but non-tax statutes also treat annuity contracts as insurance. *See, e.g.*, 10 U.S.C. § 7082 (requiring Navy civilian

[4] The court of appeals concluded that because annuity contracts both transfer and distribute the actuarially-derived risk of outliving one's resources, annuity contracts meet the functional test of insurance. NationsBank Pet. App. 12a; *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979) ("[i]nsurance is an arrangement for transferring and distributing risk") (*quoting* R. Keeton, *Insurance Law* § 1.2(a) (1971)). Annuity contracts (which insure against outliving one's resources) may be called the "inverse" or "mirror image" of life insurance, which insures against the economic risk of dying prematurely. That does not establish, as petitioners contend, that annuity contracts are not insurance, but only that annuity contracts and life insurance are different insurance products. As one insurance authority writes, life insurance and annuities "are both insurance in the true sense of the term." NationsBank Pet. App. 12a, quoting S. Huebner and K. Black, *Life Insurance*, at p. 105 (6th ed. 1964).

employees to carry annuity policy in "life insurance corporation").

Indeed, the Bank Holding Company Act ("BHC Act") reflects Congress' view that annuity contracts are insurance. The BHC Act provides that, subject to exceptions not relevant here, bank holding companies may not provide insurance as principal, agent or broker because such activity "is not closely related to banking." 12 U.S.C. § 1843(c)(8) (reproduced in Appendix B, *infra*). A further proviso in the BHC Act also bars certain bank holding companies from selling "life insurance or *annuities* except as provided in subparagraph (A), (B), or (C)." *Id.* (emphasis added). Significantly, subparagraph (C) tracks the language of section 92, and permits bank holding companies to conduct (*id.*):

> any insurance agency activity [including the sale of annuities, as provided in the proviso] in a place that (i) has a population not exceeding five thousand . . . .

Thus Congress specifically equated annuities with insurance in a statute that tracks the language of section 92. Annuity contracts plainly are insurance under section 92.[5]

[5] In an argument that the Comptroller does not join, the NationsBank petitioners claim that the court of appeals' decision violates this Court's decision in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959). But that decision held only that variable annuity contracts are not exempt from securities registration because the return to the annuitant is, by definition, variable. The Court explained that because variable annuity contracts include some investment risk for the purchaser (though the insurance company assumes a mortality risk), they are covered by the pro-disclosure policies of the Securities Act of 1933. *Id.*, at 77 (Brennan, J., concurring). Nothing in that opinion draws into question the court of appeals' conclusion that *fixed* annuity contracts are insurance under section 92. Although the petitions here ambiguously lump together both variable annuity contracts and fixed annuity contracts, Gov't Pet. at 17 n.9, *SEC v. VALIC* addressed only variable annuity contracts. Indeed, the reasoning in *SEC v. VALIC* supports the court of appeals' decision that fixed annuity contracts are an insurance product. 359

B. The Court Of Appeals Properly Applied *Chevron*

Petitioners challenge the court of appeals' supposed failure to pay sufficient homage to the Comptroller's interpretation of section 92. Gov't Pet. at 21; NationsBank Pet. at 14. Petitioners do not complain that the court of appeals ignored *Chevron*, nor do they allege that it rejected or modified *Chevron*'s two-step analysis. Rather, petitioners claim that the court of appeals wrongly determined that deference was not appropriate because the intent of Congress in section 92 is clear. This supposed error does not warrant review by this Court, whose resources would be sorely tried if it had to rectify every allegedly incorrect application of *Chevron*. This Court has denied certiorari in two dozen cases in the past five years that raised *Chevron* issues. See Appendix C, *infra*.

Review by this Court also is unwarranted because the court of appeals properly stated, understood, and applied *Chevron*. Finding the language and legislative genesis of section 92 to unambiguously bar NationsBank's proposal, the court reaffirmed *Saxon*'s holding that "under § 92 'national banks have no power to act as insurance agents in cities of over 5,000 population.'" NationsBank Pet. App. 6a. The court noted that deference is not appropriate under *Chevron* when the intent of Congress is so clear. *Id.*, at 9a. Moreover, since the Approval reversed the Comptroller's previous interpretation of section 92 in 1978 and 1982, *see* pp. 4-5, *supra*, the Approval is not entitled to significant deference under *Chevron*. *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2535 (1991) ("the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views"); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-13 (1988).

U.S. at 71. *See also SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 206 (1967) ("provisions dealing with the operation of the fixed-payment annuity were purely conventional insurance provisions"). Moreover, variable annuity products are still regulated as insurance in all 50 states.

This Court recently warned that the principle of deference "has its limits" and emphasized that "[d]eference does not mean acquiescence." *Presley*, 112 S. Ct. at 831. Several factors support the court of appeals' conclusion that annuity contracts are insurance: (i) all fifty states regulate annuity contracts as insurance; (ii) numerous federal statutes (including the Bank Holding Company Act) treat annuity contracts as insurance; (iii) the Comptroller himself recognized annuity contracts to be insurance as recently as 1978; and (iv) the Comptroller concedes that "annuities have historically been a product of insurance companies" and often involve an "element of mortality risk." Deference would not be appropriate here.

The government contends that the court of appeals' failure to accept the Comptroller's new view of section 92 is a "particularly flagrant" failure to follow *Chevron*. But the Fifth Circuit's holding on section 92 simply followed the Second Circuit's decision in *American Land Title*, which also reversed a ruling by the Comptroller and which this Court declined to review. *See* Petition for Certiorari, *Steinbrink v. American Land Title Ass'n*, No. 92-645, at i (question presented is whether section 92 "impliedly bar[s]" large-town banks "from selling forms of insurance..., that the Comptroller of the Currency has determined are 'incidental' to the 'business of banking' under 12 U.S.C. 24 seventh").

Finally, petitioners ask this Court to turn *Chevron* on its head. The government complains that, following the Fifth Circuit's ruling, the statutory bar against national banks selling annuity contracts is "beyond the power of federal regulators to correct." Gov't Pet. at 25. Exactly. Congress clearly decided that national banks in large towns may not act as agents for life insurance companies, which includes the sale of annuity contracts. That statutory requirement is indeed "beyond the power of federal regulators to correct." *See Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847-48 (1992) ("[o]nce we have determined a

statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning"). If Congress has adopted bad policy, the petitioners, as the Fifth Circuit advised, "'should look to Congress, not the Comptroller' . . . . or the courts" for relief. NationsBank Pet. App. 17a.[6]

II. THERE IS NO CONFLICT AMONG THE LOWER COURTS

Petitioners assert that this case presents a "classic" conflict among the circuits over the extent to which section 92 limits national banks' power to sell insurance. Gov't Pet. at 19; NationsBank Pet. at 22. Petitioners claim that even though this case agrees with the Second Circuit decision in *American Land Title*, it supposedly conflicts with the D.C. Circuit's decision in *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980). There is no conflict. In fact, the *Heimann* court specifically found that its ruling did not conflict with *Saxon*, the precedent that controlled this case.

Heimann held that national banks have the incidental authority under 12 U.S.C. § 24(7) to sell credit life insurance to their borrowers. That is, in exchange for a fee, the borrower's debt will be satisfied if he dies before the loan is repaid. As the Fifth Circuit found, and as the Comptroller's Approval concedes, *Heimann* discusses section 92 only in dicta. NationsBank

[6] The central holding below was first announced by the Fifth Circuit in *Saxon* more than 25 years ago. Congress has had ample opportunity to repair any error in that interpretation of section 92, but has not done so. To the contrary, in amending the Bank Holding Company Act in 1982, Congress *extended* to bank holding companies the prohibition on the sale of insurance by national banks. Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, §§ 118(a), 601 (1982) (sale of insurance "is not closely related to banking").

Pet. App., 42a. *Heimann* concluded that section 92 does not bar credit life insurance, which is "a limited special type of coverage written to protect loans," a core banking function. 613 F.2d at 1170. Credit life insurance is designed primarily to protect the assets of the bank, and only secondarily to aid the borrower. Implicitly, *Heimann* concluded that credit life insurance is more a banking product than it is insurance. In contrast, annuity contracts are not tied to any banking operation.

Heimann stressed that because credit life insurance is so closely tied to banking functions, its ruling did not conflict with *Saxon*, which concerned insurance products unrelated to banking. *Id.* By the same reasoning, *Heimann* does not conflict with the Fifth Circuit ruling here, which concerns an insurance product totally unrelated to any banking function.

The government concedes that this Court declined to review this supposed conflict when it denied certiorari in *American Land Title*, and adds that it would not "normally seek further review." Gov't Pet. at 19-20. The government offers several reasons why review nevertheless is appropriate; none is persuasive.

The government states that this case involves a "particularly flagrant failure" to apply *Chevron*. As we have noted, that argument is contradicted by this Court's refusal to review *American Land Title*. *See* p. 13, *supra*.

Second, the Comptroller suggests that reversal of the court of appeals' ruling is necessary to "maintenance of a strong banking industry." Gov't Pet. at 20. Unless reversed, the Comptroller frets, that ruling may imperil a profitable product line for national banks (*id.*, at 23).

Petitioners contradict their own suggestion. The Comptroller acknowledges that banks sold $12.2 billion of annuity contracts in 1992, Gov't Pet. at 23, but never discloses that most of those sales will be totally unaffected by the outcome of this

case. Most of those sales are conducted through state-chartered banks, bank subsidiaries, or third-party arrangements with national banks. *See* Gov't Pet. at 22 n.12 (bank annuity contract sales "are almost invariably conducted through brokerage subsidiaries").

For example, nothing in the decision below affects "commonplace lobby lease and similar license arrangements used by many vendors to sell annuities . . . through banks." David W. Roderer, "Congress Should Defer Action on Bank Annuity Sales," *American Banker*, (Nov. 3, 1993), p. 12. Typically, licensed insurance agencies rent space in the national bank's lobby, placing their own employees or bank employees on the premises to sell annuity contracts to the bank's customers. Payments to the national bank are based on the gross commissions earned. Alternatively, a recent decision would permit even big-city national banks to broker insurance nationwide, so long as they conduct those sales from small town branches. *See Independent Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). National banks, therefore, have several methods for offering annuity contracts to their customers — and for earning revenues from those sales — despite the court of appeals ruling.

The government also complains that it may not be able to relitigate this legal question in other courts. It is "possible," according to the government, that judicial recusals will leave the panel opinion intact in the Fifth Circuit, and that VALIC may be able to challenge in the Fifth Circuit all national bank annuity activities. Gov't Pet. at 22. Such speculations provide no basis for granting certiorari. If those "possibilities" occur, and if they then loom large for this Court, there will be ample time to address them.

Finally, petitioners point to a recent decision by the New York Court of Appeals that annuities are not insurance under that state's banking law, arguing that it "will generate substantial

confusion and uncertainty." NationsBank Pet. at 19-20. The New York case, however, did not construe the powers of national banks; nor did it interpret section 92 or any state statute resembling section 92, as the New York court acknowledged. *New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Dep't*, 83 N.Y.2d 353 (1994). Accordingly, there is no conflict between that case and the judgment below.

III. THE SALE OF ANNUITY CONTRACTS IS NOT "NECESSARY TO CARRY ON THE BUSINESS OF BANKING"

Petitioners ignore entirely the further holding of the court of appeals that, if sustained by this Court, would prevent this Court from reaching the questions petitioners now raise. The court of appeals held that, regardless of the meaning of section 92, the selling of annuity contracts is not within the powers of a national bank under § 24(7), which grants only "such incidental powers as shall be *necessary* to carry on the business of banking." NationsBank Pet. App. 15a. (Emphasis added.) The Fifth Circuit held (*id.*):

> The Comptroller argues that the selling of annuities is an "incidental power" granted to national banks under § 24(7). The Comptroller's argument ignores the rest of [the statutory provision], i.e., "necessary to carry on the business of banking." Even conceding arguendo that the power to sell annuities would be one incidental to banking, by no stretch of the imagination can that power be deemed "necessary."

Because the sale of annuity contracts is not "necessary to carry on the business of banking" under § 24(7), this Court would have no occasion to reach the questions presented in the Petitions.

CONCLUSION

For all of the foregoing reasons, the Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel

APPENDIX A

June 16, 1978

Dear Mr.

This is in response to your letter of March 21, 1978, to the Regional Administrator's Office in Denver, Colorado. You state that the bank would purchase a group annuity policy from an insurer and then sell annuity contracts as investments in trust accounts. The insurer would pay a fee to the bank for these contracts. You wish to know whether this activity would render the bank a seller or broker of insurance in violation of the provisions of 12 U.S.C. §92. You also ask whether the contracting by your bank with a single insurer in and of itself would call into question the prudence of the annuity investments or the arm's-length nature of the bank's dealings with the insurer.

It is my opinion that an arrangement of the kind that you describe would constitute the bank a seller or broker of insurance in violation of the provisions of 12 U.S.C.. §92. You also ask whether the contracting by your bank with a single insurer in and of itself would call into question the prudence of the annuity investments or the arm's-length nature of the bank's dealings with the insurer.

It is my opinion that an arrangement of the kind that you describe would constitute the bank a seller or broker of insurance within the meaning of 12 U.S.C. §92. Although you indicate that the bank would perform various duties for this fee and although you state that this fee is a fiduciary fee which is more convenient for the insurance company to pay, the fee is in reality a fee that the bank is receiving for the sale of insurance. The duties that the bank would perform in connection with this service are not such as to take it out of the category of a broker or seller of insurance, particularly where the bank has a financial interest in the amount of insurance sold.

Furthermore, it is my opinion that contracting with a single insurer in and of itself may call into question the prudence of the annuity investments and the arm's-length nature of the bank's dealings with the insurer. On its face it appears that this arrangement is a business deal whereby the bank would be compensated for representing the insurance company and encouraging the sale of a product that the insurance company has to offer. The only purchasers of this service are trust accounts under the bank's administration. The bank, having a specific pecuniary interest in this arrangement, might not be in a position to render the highest investment advice in administering these trust accounts. The bank might be viewed more as a fiduciary and administrator of trust account and less as a broker or seller of insurance if it did not have such a group contract in existence, and if it were in a position of recommending individual annuity contracts only in certain instances and where its own pecuniary interest would not be as great or directly connected.

In addition, in any arrangements of the kind proposed in your letter, the bank should be careful to abide by the provisions of Section 9.12 of the *Comptroller's Manual for National Banks* (12 C.F.R. 9.12) including in particular those contained in subsection (a) thereof.

I trust this is responsive to your inquiry and will enable you to take such action as you deem appropriate.

Very truly yours,

/s/
Charles F. Byrd
Assistant Director
Legal Advisory Services Division

APPENDIX B

12 U.S.C. § 1843(c) provides (emphasis added):

(c) The prohibitions in this section shall not apply to ...

(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto, but for purposes of this subsection it is not closely related to banking or managing or controlling banks for a bank holding company to provide insurance as a principal, agent, or broker except (A) where the insurance is limited to assuring repayment of the outstanding balance due on a specific extension of credit by a bank holding company or its subsidiary in the event of the death, disability, or involuntary unemployment of the debtor; (B) in the case of a finance company which is a subsidiary of a bank holding company, where the insurance is also limited to assuring repayment of the outstanding balance on an extension of credit in the event of loss or damage to any property used as collateral on such extension of credit and, during the period beginning October 15, 1982, and ending on December 31, 1982, such extension of credit is not more than $10,000 ($25,000 in the case of an extension of credit which is made to finance the purchase of a residential manufactured home and which is secured by such residential manufactured home) and for any given year after 1982, such extension of credit is not more than an amount equal to $10,000 ($25,000 in the case of an extension of credit which is made to finance the purchase of a residential manufactured home and which is secured by such residential manufactured home) increased by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers published monthly by the Bureau of Labor Statistics for the period beginning on January 1, 1982, and ending on December 31 of the year preceding the year in which such extension of credit is made; (C) any

insurance agency activity in a place that (i) has a population not exceeding five thousand (as shown by the last preceding decennial census), or (ii) the bank holding company, after notice and opportunity for a hearing, demonstrates has inadequate insurance agency facilities; (D) any insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on May 1, 1982, or which the Board approved for such company or any of its subsidiaries on or before May 1, 1982, including (i) sales of insurance at new locations of the same bank holding company or the same subsidiary or subsidiaries with respect to which insurance was sold on May 1, 1982, or approved to be sold on or before May 1, 1982, if such new locations are confined to the State in which the principal place of business of the bank holding company is located, any State or States immediately adjacent to such State, and any State or States in which insurance activities were conducted by the bank holding company or any of its subsidiaries on May 1, 1982, or were approved to be conducted by the bank holding company or any of its subsidiaries on or before May 1, 1982, and (ii) sales of insurance coverages which may become available after May 1, 1982, so long as those coverages insure against the same types of risks as, or are otherwise functionally equivalent to, coverages sold on May 1, 1982, or approved to be sold on or before May 1, 1982 (for purposes of this subparagraph, activities engaged in or approved by the Board on May 1, 1982, shall include activities carried on subsequent to that date as the result of an application to engage in such activities pending on May 1, 1982, and approved subsequent to that date or of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition); (E) any insurance activity where the activity is limited solely to supervising on behalf of insurance underwriters the activities of retail insurance agents who sell (i) fidelity insurance and property and casualty insurance on the real and personal property used in the operations of the bank holding company or any of its subsidiaries, and (ii) group insurance that protects the employees of the bank holding company or any of its subsidiaries; (F) any insurance agency activity engaged in by a bank holding company, or any of its subsidiaries, which bank holding company, or any of its subsidiaries, which bank holding company has total assets of $50,000,000 or less: Provided, however, That such a bank holding company and its subsidiaries may not engage in the sale of life insurance or annuities except as provided in subparagraph (A), (B), or (C); or (G) where the activity is performed, or shares of the company involved are owned, directly or indirectly, by a bank holding company which is registered with the Board of Governors of the Federal Reserve System and which, prior to January 1, 1971, was engaged, directly or indirectly, in insurance agency activities as a consequence of approval by the Board prior to January 1, 1971. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection, the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern. Notwithstanding any other provision of this chapter, if the Board finds that an emergency exists which requires the Board to act immediately on any application under this subsection involving a thrift institution, and the primary Federal regulator of such institution concurs in such finding, the Board may dispense with the notice and hearing requirement of this subsection and the Board may approve or deny any such application without notice or hearing. If an application is filed under this paragraph in

connection with an application to make an acquisition pursuant to section 13(f) of the Federal Deposit Insurance Act [12 U.S.C.A. § 1823(f)], the Board may dispense with the notice and hearing requirement of this paragraph and the Board may approve or deny the application under this paragraph without notice or hearing. If an application described in the preceding sentence is approved, the Board shall publish in the Federal Register, not later than 7 days after such approval is granted, the order approving the application and a description of the non-banking activities involved in the acquisition; . . . .

APPENDIX C

RECENT DENIALS OF CERTIORARI IN CASES PRESENTING QUESTION OF DEFERENCE TO ADMINISTRATIVE AGENCY

American Waste & Pollution Control Co. v. Ouachita Parish Police Jury, No. 92-1495, 61 U.S.L.W. 3735, 3771 (1993) (court below did not defer)

Aulston v. United States, No. 90-1225, 59 U.S.L.W. 3621, 3763 (1991)

Bullard v. Madigan, No. 90-1272, 59 U.S.L.W. 3641, 3769 (1991)

California Public Util. Comm'n v. FERC, No. 90-505, 59 U.S.L.W. 3334, 3460 (1991) (court below did not defer)

Cedar Coal Co. v. Shuff, No. 92-662, 61 U.S.L.W. 3389, 3478 (1993)

Clark v. Department of the Army, No. 93-515, 62 U.S.L.W. 3308, 3491 (1994)

Clinchfield Coal Co. v. Federal Mine Safety and Health Review Comm'n, No. 90-77, 59 U.S.L.W. 3099, 3247 (1990)

Enron Oil & Gas Co. v. Babbitt, No. 92-1726, 61 U.S.L.W. 3824, 62 U.S.L.W. 3206 (1993)

Independent Ins. Agents of Am., Inc. v. Board of Governors of the Fed. Reserve Sys., No. 89-1620, 58 U.S.L.W. 3726, 59 U.S.L.W. 3243 (1990)

Independent Ins. Agents of Am., Inc. v. Citicorp, No. 91-587, 60 U.S.L.W. 3361, 3478 (1992) (court below did not defer)

Katsis v. INS, No. 93-423, 62 U.S.L.W. 3300, 3472 (1994)

Ludwig v. American Land Title Ass'n, No. 92-645, 61 U.S.L.W. 3384, 3830 (1993) (court below did not defer)

MCI Telecommunications Corp. v. American Telephone & Telegraph Co., No. 92-1684, 61 U.S.L.W. 3796, 3853 (1993) (court below did not defer)

Mesa Operating Ltd. Partnership v. Department of the Interior, No. 91-706, 60 U.S.L.W. 3410, 3498 (1992)

Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, No. 89-1874, 58 U.S.L.W. 3824, 59 U.S.L.W. 3211 (1990)

Miller v. Rice, No. 90-529, 59 U.S.L.W. 3347, 3561 (1991)

PGDH Liquidating Trust v. Shalala, No. 93-348, 62 U.S.L.W. 3202, 3375 (1992)

Puerto Rico Aqueduct v. Comite Pro Rescate, No. 89-1185, 58 U.S.L.W. 3568, 3595 (1990)

Puget Sound Power & Light Co. v. Bonneville Power Admin., No. 90-1415, 59 U.S.L.W. 3713, 3741 (1991)

Quantum Chemical Corp. v. Distillery, Wine and Allied Workers, No. 89-1937, 59 U.S.L.W. 3009, 3244 (1990)

Southern Natural Gas Co. v. Fritz, No. 88-148, 57 U.S.L.W. 3244, 58 U.S.L.W. 3240 (1989) (court below did not defer)

Texas Apparel Co. v. United States, No. 89-769, 58 U.S.L.W. 3399, 3427 (1990)

Wagner Seed Co. v. Bush, No. 91-1140, 60 U.S.L.W. 3586, 3687 (1992)

Western Fuels-Utah, Inc. v. Lujan, No. 89-1728, 58 U.S.L.W. 3759, 59 U.S.L.W. 3244 (1990)